No. 83-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KATHRYN R. ROBERTS, Acting Commissioner,
Minnesota Department of Human Rights; *et al.*,

Appellants,

v.

THE UNITED STATES JAYCEES,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE BOY SCOUTS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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BRIEF OF THE BOY SCOUTS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

The Boy Scouts of America, as *amicus curiae,* supports affirmance of the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case. 709 F.2d 1560.

INTEREST OF THE AMICUS CURIAE

The Boy Scouts of America is a voluntary, nonprofit membership organization chartered by Congress in 1916

> "to promote, through organization, and cooperation with other agencies, the ability of boys to do

> things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues." 36 U.S.C. § 23.

Through hundreds of local councils and thousands of individual Scout troops, Cub packs and Explorer posts, the Boy Scouts brings the Scouting program to more than three million American youths. Parents of Boy Scouts have entrusted the safety and welfare of their children to the adult volunteer members of the Boy Scouts, who supervise Boy Scouts at weekly meetings and overnight trips away from home. The Boy Scouts' purpose is to build qualities of character in young boys, and to inculcate in them specific moral values to which the Scouts and their parents have chosen to subscribe.

This case presents issues of vital importance to the Boy Scouts and to other membership associations organized for the purpose of promoting and inculcating particular values and beliefs. Crucial to the ability of these groups to maintain their identity and to promote their purposes is their control over membership policies. Yet those membership policies are under increasing attack through application of state "public accommodations" laws like the one in Minnesota. Similar statutes in California and Connecticut have already been held to override the Boy Scouts' membership policies and specifically to prohibit the Boy Scouts from excluding homosexuals or women from certain leadership positions.[1] Many other national organizations have had their membership policies challenged under public accommodations laws. *See* Motion to Affirm, filed December 1, 1983, at 2-5.

[1]*See Curran v. Mt. Diablo Council of the Boy Scouts of America,* 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *hearing denied* (Cal. January 6, 1984), *appeal pending,* No. 83-1513 (U.S., filed March 14, 1984); *Pollard v. Quinnipiac Council, Boy Scouts of America,* P.A-SEX-37-3 (Conn. Comm. on Human Rights and Opportunities) (decision of hearing examiner, January 4, 1984), *petition for review filed* (Conn. Super. Ct. January 19, 1984).

The appellants and their *amici* are pressing this Court to adopt a stunted concept of the nature and scope of associational freedom. This case thus provides the Court with an opportunity to reaffirm the constitutional protections afforded to membership organizations like the Boy Scouts and thereby to protect them from future legal attacks that threaten their ability to operate on a national basis. This brief analyzes the nature of the constitutional freedom of association and the limits that it imposes on State regulation of organizations' membership policies.

SUMMARY OF ARGUMENT

I

The freedom of association is not a mere appendage to the rights enumerated in the First Amendment, but is an independent constitutional value fundamental to our Nation's concept of liberty. Two distinct aspects of individual liberty coalesce under the rubric of "freedom of association": the right to join with others to express and promote religious, philosophical, moral or cultural values or to share in recreational, social or economic interests, and the right to be free from government intrusion in certain activities involving personal relationships.

Both of these rights have roots deep in the political beliefs of our Founding Fathers. Both have been acknowledged throughout our history and differentiate our society from totalitarian regimes. And both have been protected by the decisions of this Court. The Court has defended the right to join with others not simply for political purposes, but for a broad range of activities and interests, whether they are social, professional, political, avocational or religious. Similarly, this Court has protected people's privacy from governmental intrusion on the basis of the physical locations in which the activities occur and the nature of the personal relationship that the government wishes to regulate.

II

To overcome the presumption against intrusion into the freedom of association, the State must demonstrate a sufficiently compelling justification for its action. A court's evaluation of the State's justification must take into account a number of different factors. The predominant issue is whether the association is an enterprise engaged in essentially commercial transactions. The more the organization is designed to serve, preserve, inculcate or promote other values, the greater the protection afforded by the Constitution. Organizations promoting or protecting religious, political or moral values have the greatest protection; the government can intrude upon such groups only if its regulatory actions are justified by the most compelling reasons and are embodied in the most narrowly drawn regulation.

Similarly, the protection of associational privacy will be at its greatest when the organization's functions involve little or no marketplace commercial activity. However, even associations that are engaged in some commercial activities may retain personal privacy protection. The degree of constitutional protection ultimately turns on an analysis of the nature of the relationships and activities at stake.

Several factors must be considered in deciding how compelling the State's interests are. Discharge of core governmental functions such as protection of public health and safety or the implementation of affirmative constitutional policies deserve more deference than assertions of the State's general regulatory powers. Greater force also may be given to supervision of activities traditionally subject to such governmental regulation, or activities in which the government itself has traditionally engaged. A final consideration is the degree to which the State action intrudes into the association's internal affairs as distinguished from its dealings with the public. When an

organization's membership policies are functionally linked to the purposes and goals of the organization, government tampering with those policies will be hardest to justify.

III

The court below properly applied the constitutional test in finding Minnesota's public accommodations statute unconstitutional insofar as it interferes with the Jaycees' membership policies. The court recognized the Jaycees' strong associational interest as a non-commercial organization whose purposes reach the core of First Amendment values. The State action threatens a great intrusion into those interests in the name of eliminating a practice that does not impose a great burden on public commerce, public life, or on the economic opportunities of women. In sum, the court properly concluded that the State had not shouldered its burden to justify its interference with the constitutional rights of the Jaycees' members.

ARGUMENT

I. FREEDOM OF ASSOCIATION HAS AN INDEPENDENT CONSTITUTIONAL STATUS.

Appellants and their *amici* urge the Court to adopt a crimped view of the freedom of association. Under their analysis, associational interests would lack any constitutional dignity except when linked to the promotion of enumerated First Amendment rights. Freedom of association, however, is not merely an appendage to the enumerated rights or simply a mechanism for their exercise. It is a separate human right inherent in the Constitution's plan for limited governmental powers.

Freedom of association is an independent constitutional value fundamental to our concept of liberty. As De Tocqueville wrote 150 years ago,

> "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to be as almost inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." 1 A. De Tocqueville, DEMOCRACY IN AMERICA 203 (P. Bradley ed. 1945).

This Court has confirmed De Tocqueville's observation by holding that freedom of association is "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker,* 364 U.S. 479, 486 (1960).

Two distinct aspects of individual liberty coalesce under the rubric "freedom of association." First is the person's right to associate with others to nurture or express political, religious, philosophical or cultural values, or simply to pursue economic, social, or recreational interests. *See generally Healy v. James,* 408 U.S. 169, 181 (1972). Second is the right of privacy, the right to be free from intrusion into certain spheres of activity involving personal relationships. Both "the rights of association and of privacy" are "unarticulated rights . . . implicit in enumerated guarantees." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 579 (1980) (plurality opinion).

A. The Right To Join With Others

The right of people to join together for common purposes has roots deep in the beliefs of our Founding Fathers. Philosophers going back to Aristotle had "advanced the right of association as a protection against a universal conformity . . . ." C. Rice, FREEDOM OF ASSOCIATION 3 (1962). The seventeenth century British theorists who shaped political thought in colonial America "all

stressed the social nature of man and related to it the concomitant natural rights to associate and assemble." C. Antieau, RIGHTS OF OUR FATHERS 82 (1968). John Locke, for example,

> "assumes that the individual has a natural and inalienable right to associate. He needs no permission from government to exercise this right; indeed, civil society has an obligation to protect his right and to limit it only on a clear demonstration of necessity. It is this principle which is the foundation of Anglo-American thinking about freedom of association." R. Horn, GROUPS AND THE CONSTITUTION 8 (1956).[2]

The right to join together in voluntary societies, open or secret, lay at the heart of the American experiment.[3] Benjamin Franklin, for example, started, among other membership groups, a secret club of artisans and tradesmen, a volunteer fire department, and the American Philosophical Society. *See* Schlesinger, *supra,* 50 Amer. Hist. Rev. at 3. The First Amendment's specific protections presupposed the underlying human right to associate for the pursuit of *any* lawful goal deemed suitable by the participants. Freedom of expression was not limited to the lone voice, and freedom of assembly was simply a specific

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[2] In contrast, Thomas Hobbes, whose belief in the omnipotent state formed the counterpoint to the philosophy of Locke and the Founding Fathers, condemned private associations and believed that the Sovereign could regulate them without restraint. *See* C. Rice, *supra,* at 6-8; R. Horn, *supra,* at 5-6. Hobbes' hostility toward the freedom of association paralleled the attitude of the Star Chamber, which "regarded as illegal any unlicensed combination of men whose purposes were considered contrary to public policy by the judges, even though the acts involved were neither tortious nor indictable crimes." D. Fellman, THE CONSTITUTIONAL RIGHT OF ASSOCIATION 3 n.7 (1963).

[3] *See* Schlesinger, *Biography of a Nation of Joiners,* 50 Am. Hist. Rev. 1, 5-9 (1944); *see also* C. Rice, *supra,* at 20-21, 24-26, 28-31; Douglas, *The Right of Association,* 63 Colum. L. Rev. 1361, 1373 (1963).

example of the fundamental liberty to join with others, a public manifestation that some believed might need explicit protection. *See* D. Fellman, *supra,* at 2-10; R. Horn, *supra,* at 17-18.

Building on this rich tradition of associational freedom that had contributed to the creation of the Republic, the nineteenth century saw tremendous growth in membership associations in the United States. Cultural, humanitarian, fraternal and professional societies became core components of American society. Schlesinger, *supra,* 50 Amer. Hist. Rev. at 9-19; M. Abernathy, *The Right of Assembly and Association* 171-73 (2nd ed. 1981). By 1835, De Tocqueville could write, "Americans of all ages, all conditions, and all dispositions, constantly form associations," and could conclude that in "no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America." DEMOCRACY IN AMERICA, *supra,* vol. II at 114 and vol. I at 198.

This growth in associational activities to promote political, philosophical, moral, social and recreational goals did not arise fortuitously; it reflected the autonomous role of the individual under our constitutional system.

> "In the United States individualism has meant not the individual's independence of other individuals, but his as well as their independence of governmental restraint. Traditionally, Americans have distrusted collective organization as embodied in government while insisting upon their own untrammeled right to form voluntary associations." A. Schlesinger, PATHS TO THE PRESENT 23 (1949).

The need for associational freedom has grown as the institutions which control our society, including government, have grown:

> "Freedom of association has always been a vital feature of American society. In modern times it has assumed even greater importance. More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives." Emerson, *Freedom of Association and Freedom of Expression,* 74 Yale L.J. 1 (1964).

Accordingly, freedom of citizens to associate to preserve and pursue particular interests and values constitutes a pillar of our pluralistic society:

> "A Free Society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, economic, religious, educational, and political programs are formulated.
>
> * * *
>
> "There is no other course consistent with the Free Society envisioned by the First Amendment. For the views a citizen entertains, the beliefs he harbors, the utterances he makes, the ideology he embraces and the people he associates with are no concern of government. That article of faith marks indeed the main difference between the Free Society which we espouse and the dictatorships both on the Left and on the Right." *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539, 563, 570 (1963) (Douglas, J., concurring).

The truth of Justice Douglas' observation is borne out by the history of totalitarian regimes. In their attempt to dominate the lives of their citizens, totalitarian governments have been quick to outlaw all associations that do

not conform to the government's orthodoxy. The complete domination by such governments of all groups, particularly youth organizations, has presented the world with many chilling spectacles. Free association serves to counterbalance the pressure to conformity. That is why totalitarian regimes loathe this freedom; it is also the reason why it must be carefully guarded as a vital element of our free society.

In sharp contrast to the constraints that appellants and their *amici* now invite the Court to impose, this Court has repeatedly described, in broad terms, the constitutional foundation of the freedom of association. Indeed, the Court has recognized that joining a particular membership society is itself an expression of a person's support for the society's goals and principles: the First Amendment freedom of expression "includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it . . . ." *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965). As this Court observed in *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460 (1958), it is "beyond debate that freedom to engage in association for the advancement of beliefs and ideas" is protected by the Constitution. *Accord Gibson v. Florida Legislative Investigation Committee, supra,* 372 U.S. at 543; *Healy v. James, supra,* 408 U.S. at 181.

The Court has steadfastly applied the protection not just to committees devoted to political advocacy, but to virtually all forms of affiliation promoting any lawful goals. Thus, the right to be free of state interference has been applied not only to associations devoted to promoting political causes, *NAACP v. Alabama ex rel. Patterson, supra, Bates v. City of Little Rock,* 361 U.S. 516 (1960), but also to groups facilitating access to the courts, *In re*

Primus, 436 U.S. 412, 426 (1978), engaging in education, *see University of California Regents v. Bakke,* 438 U.S. 265, 311-12 (1978) (Powell, J., concurring) (discussing *Sweezy v. New Hampshire,* 354 U.S. 234 (1957)), or promoting other economic and legal interests, *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1 (1964), *Thomas v. Collins,* 323 U.S. 516 (1945). In sum, this Court has concluded that an association is entitled to freedom from governmental intrusion regardless of whether its primary organizing theme is "social," "economic," "professional," "political," "avocational," "religious" or "cultural." *Shelton v. Tucker, supra,* 364 U.S. at 488; *NAACP v. Alabama ex rel. Patterson, supra,* 357 U.S. at 461; *see generally* Rice, *The Constitutional Right of Association,* 16 Hastings L. J. 491 (1965); M. Abernathy, *supra,* at 173-195.[4]

An essential ingredient of this right to join with others is the right to define the group's identity and purposes through membership criteria. The constitutional right "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 122 (1981). The exercise of this prerogative to exclude others from the group is as entitled to constitutional autonomy as is the initial decision to form the group. The Court has recognized that the freedom from compelled association is a corollary of the freedom to associate, and thus that the

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[4] It would be unrealistic to follow the suggestion made by the appellants and their *amici* that the Court attempt to draw a bright constitutional line between associations that are avowedly "political" or "advocacy" organizations and those that are not:

> "Today, there are many thousands of voluntary, non-profit associations, of all sorts and purposes. In one way or another, each of these is actually or potentially a pressure group. That there is a fundamental right to form and join them cannot be questioned." Rice, *supra,* 16 Hastings L.J. at 501.

First Amendment protects citizens in exercising their choice either "to associate or not to associate with whom they please." *Minnesota State Board for Community Colleges v. Knight,* ___ U.S. ___, ___, 52 U.S.L.W. 4204, 4209 (February 21, 1984). As the Court explained in *Gilmore v. Montgomery,* 417 U.S. 556, 575 (1974), quoting Justice Douglas' opinion in *Moose Lodge No. 102 v. Irvis,* 407 U.S. 163, 179-80 (1972), "Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires."

The most common reason why people organize themselves into groups is to share and promote common interests and beliefs. Thus, the group's view of common interests or beliefs will determine a person's eligibility for membership in the group. Potentially exclusive factors such as a person's political beliefs, religion, race, national origin, employment experience, native tongue, military service, genealogy, age or sex may constitute the binding common interest that brings individuals together. Insistence on undiluted adherence to a particular goal, value or characteristic thus gives the organization its cohesiveness, its very reason for being. Organization on the basis of such exclusive criteria facilitates the effective representation and pursuit of the particular association's own theme. It also promotes the pluralism of society by allowing diverse groups to maintain their identity and to promote their own values. *See Developments in the Law: Judicial Control of Actions of Private Associations,* 76 Harv. L. Rev. 983, 987-88 (1963); A. Westin, PRIVACY AND FREEDOM 42 (1967); R. Horn, *supra,* at 153-55; M. Abernathy, *supra,* at 239-44.

B. The Right To Privacy

The right to privacy in conducting one's personal life and personal relationships also has roots deep in our legal traditions. While the constitutionally protected interests

were not often discussed in terms of "privacy" before this century, it has long been considered fundamental to personal liberty that some realms are protected from government intrusion. Any notion that the right to privacy is a "modern" creation is "simply bad history and bad law." A. Westin, *supra*, at 337; *see id.* at 330-337. William Pitt eloquently voiced this principle in 1766:

> "The poorest man, may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." (*Quoted in* T. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 365 n.4 (5th ed. 1883).)

This famous declaration expressed the abiding principle, long recognized by this Court, that government should respect "the sanctity of a man's home, and the privacies of his life." *ICC v. Brimson,* 154 U.S. 447, 479 (1894). This Court has repeatedly protected the integrity of places, like the home, where people can enjoy personal privacy. *Stanley v. Georgia,* 394 U.S. 557, 568 (1969); *Ginsberg v. New York,* 390 U.S. 629, 639 (1968); *Griswold v. Connecticut, supra,* 381 U.S. at 485-86. Two constitutional amendments, the Third and Fourth, expressly protect the privacy of a person's home or other temporary sanctuary against physical intrusion by the government. Thus, government control of the membership policies of associations that conduct their activities in private homes and other similarly intimate settings would directly threaten this freedom from government intrusion.

The protection of privacy, however, extends beyond mere physical location. Justice Brandeis elegantly expressed this principle:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone —the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *quoted with approval in Stanley v. Georgia, supra,* 394 U.S. at 564.

This recognition of a broad zone of personal privacy protected from government intrusion distinguishes our constitutional government from tyrannical regimes. This protection, like the freedom to join with others to promote personal beliefs, is one of the first rights to disappear under totalitarianism.

> "This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control." Emerson, *Nine Justices in Search of a Doctrine,* in THE RIGHT TO PRIVACY: A SYMPOSIUM ON THE IMPLICATIONS OF GRISWOLD V. CONNECTICUT 33 (1971).

The Due Process Clause of the Fifth Amendment is one expression of the general concept that government is limited in how it may deal with its citizens. *See also Katz v. United States,* 389 U.S. 347, 351-52 (1967) (Fourth Amendment protects "people, not places," even in areas accessible to the public). However, if "the fourth and fifth amendments are deemed to exhaust the field of constitutional protection for privacy, then it is a rather narrow field and one unbefitting the concept of privacy as the preeminent right of civilized men." Dixon, *The Griswold Penumbra,* in THE RIGHT TO PRIVACY: A SYMPOSIUM, *supra,* at 5. The First Amendment, in its protection of freedom of thought, conscience and expression, and the "reserved powers" clause of the Ninth Amendment, reflect this pervasive constitutional postulate that some aspects of human life are beyond the regulatory zeal of the State. As a consequence of this principle, the Court has invalidated governmental efforts to regulate various private, intimate relationships, such as those between husband and wife, parent and child, and woman and physician.[5]

Protection of a broad zone of *associational* privacy is one aspect of this constitutionally protected autonomy in certain private spheres.

> "Group privacy is an extension of individual privacy. The interest protected by group privacy is the desire and need of people to come together, to exchange information, share feelings, make plans and act in concert to attain their objectives. . . . Thus, group privacy protects people's outer space rather than their inner

[5] *See, e.g., Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Loving v. Virginia,* 388 U.S. 1 (1967); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639 (1974); *Smith v. Organization of Foster Families,* 431 U.S. 816, 842-43 (1977); *see generally Roe v. Wade,* 410 U.S. 113, 152-53 (1973); L. Tribe, AMERICAN CONSTITUTIONAL LAW, § 15-20 (1978).

> space, their gregarious nature rather than their desire for complete seclusion." E. Bloustein, INDIVIDUAL AND GROUP PRIVACY 125 (1978).

As another commentator has noted, protection of such privacy is critical to the preservation of the individual's freedom to select his or her intimate associates:

> "In a free society . . . it should be the right of every citizen to choose for himself those other persons to whom he wishes to relate in a close, intimate, and continuing way. If he is to enjoy these relationships, he must be allowed the same privacy among his friends that he enjoys within his family." Note, *Association, Privacy and the Private Club: The Constitutional Conflict,* 5 Harv. C.R.-C.L. L. Rev. 460, 466 (1970).

Associational privacy is not simply an extension of individual autonomy. The protection of group privacy is itself central to our concept of liberty. "Organizational privacy is needed if groups are to play the role of independent and responsible agents that is assigned to them in democratic societies." A. Westin, *supra,* at 42. As Professor Tribe has put it, if the government may use its power to reach into any relationship between persons, then there is no defense "against the combined tyranny of the state and [the individual's] own alienation." L. Tribe, *supra,* at 988.

II. THE STATE'S ABILITY TO DEMONSTRATE AN ADEQUATELY COMPELLING BASIS FOR INTERFERING WITH THE FREEDOM OF ASSOCIATION DEPENDS UPON THE NATURE OF THE ASSOCIATIONAL INTEREST AT STAKE AND THE NATURE OF THE GOVERNMENT REGULATION.

The Court has insisted that any attempt by the State override First Amendment rights requires the State to

prove that the public purpose sought to be achieved is not only legitimate, but "compelling," and that it cannot be achieved without impinging upon constitutional rights. *See, e.g., United States v. Lee,* 455 U.S. 252, 256-61 (1982); *Elrod v. Burns,* 427 U.S. 347, 362-63 (1976); *Healy v. James, supra,* 408 U.S. at 184. In assessing the State's justification for its intrusion, the courts should exhibit an attitude of skepticism, for as Justice Brandeis cautioned in *Olmstead, supra,* 277 U.S. at 479, "experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." That caution applies with special force where, as here, the State proposes to elevate the non-constitutional interests of one class of citizens over the constitutionally protected right of the individual members of a specific association to adopt and enforce their own membership criteria.

A workable test for determining whether a State interest is compelling must be sensitive to the broad spectrum of goals that lead people to form associations. It must be able to adjust for the wide range of concerted activities in which members of associations engage. It must take into account the varying degrees of intimacy in associational activities, both in terms of the location of the activities and the nature of the relationships. Whether the government's need to intrude is sufficiently compelling will also turn on the nature of the public purpose to be served by the proposed restriction and the degree of precision used in invading the constitutionally protected interest. The predominant issue affecting both the degree of constitutional protection and the strength of the government's interest is whether the association is involved in an essentially commercial enterprise.

A. Is The Primary Principle Or Goal Animating The Association Commercial?

The decisions of this Court demonstrate that an organization's primary purpose will affect the strength of its constitutional protection from government interference. An association formed by co-religionists to support their common faith appears to be entitled to the most complete protection, because it presents the most extreme combination of protected associational purpose and absence of legitimate regulatory interest.[6] Organizations designed to serve and nurture political ideals or moral values would appear to stand next to religious groups on the protected end of the spectrum.[7] If an organization requires its members to subscribe or swear to an oath, law or other set of moral, religious or political principles, its membership determinations are at the core of First Amendment protection. The State would have to demonstrate an extraordinarily compelling public interest in order to justify any intrusion. *E.g., NAACP v. Button,* 371 U.S. 415, 438 (1963); *Shelton v. Tucker, supra,* 364 U.S. at 488. The same test would apply to a group that combines several of these qualities, such as the Boy Scouts, which seeks to instill and promote moral, religious, cultural and social values. *See* Jurisdictional Statement, in *Mount Diablo Council of the Boy Scouts of America v. Curran,* No. 83-1513 (U.S., filed March 14, 1984).

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[6] *See, e.g., Larson v. Valente,* 456 U.S. 228, 246 (1982); *United States v. Lee, supra,* 455 U.S. at 257-58; *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 501 (1979); *Presbyterian Church v. Hull Memorial Presbyterian Church,* 393 U.S. 440, 447-52 (1969).

[7] *See, e.g., Brown v. Socialist Workers '74 Campaign Committee (Ohio),* 459 U.S. 87 (1982); *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982); *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290 (1981); *Democratic Party v. Wisconsin ex rel. La Follette, supra; In re Primus, supra; NAACP v. Alabama ex rel. Patterson, supra.*

When an organization's primary purpose is to engage in commercial transactions, the level of constitutional protection is weaker, and the State's traditional interest in regulating the organization's affairs is greater. Commercial activities occupy a "subordinate position in the scale of First Amendment values. . . ." *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 456 (1978).[8]

B. Is The Interest In Associational Privacy Limited By The Essentially Commercial Nature Of The Association?

The inquiry into the organization's purposes is only part of the analysis. Considerations such as the intimacy of the activity, the surroundings in which the activities take place, and the contacts involved in the activities all will affect the degree of protection that the right to privacy affords to the associational activities. "It is fair to say that the strength of the privacy interest will depend to some extent upon the type of social associational relationship involved and to some extent upon the conduct regulated within that relationship." Note, *Discrimination in Private Social Clubs: Freedom of Association and Right of Privacy,* 1970 Duke L.J. 1181, 1212. "For example, the marriage relationship is entitled to greater privacy protection than the relationship of two people sitting next to one another on a bus." *Id.*

Again, the principal quality separating highly protected activites from activities that have a lesser claim to constitutional protection is the commercial or economic nature of the association's functions. In other words, how close are the activities of the group to things that one

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[8] *See First National Bank v. Bellotti,* 435 U.S. 765 (1978); *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 (1976); *Garcia v. Texas State Board of Medical Examiners,* 384 F. Supp. 434 (W.D. Tex. 1974) (three-judge court) (*per curiam*), *aff'd mem.,* 421 U.S. 995 (1975); *see generally Pittsburgh Press Co. v. Pittsburgh Commission On Human Relations,* 413 U.S. 376 (1973) (regulation of commercial speech).

normally does with friends, at home, or otherwise away from the prying eye of the State?

While "it is the constitutional right of every person to close his home or club to any person or to choose his social intimates . . . solely on the basis of personal prejudice . . . ," *Bell v. Maryland,* 378 U.S. 226, 313 (1964) (Goldberg, J., concurring), the State undoubtedly may require equal access or service where the primary purpose of the group is to engage in commercial transactions. As Professor Emerson has suggested, the "right of the government to compel personal associations" should be "framed in terms of drawing the line between the public and private sectors of our common life." Emerson, *supra,* 74 Yale L.J. at 20.

For example, the government may not tell a citizen that he must open his house to everyone simply because he invites 10 friends every week to swim in his pool or to drink at his bar. Even if the friends must help maintain the pool or bring the liquor as a condition of being invited, the government may not intervene to require that he also welcome into the group a person or class favored by the State. If the pool is on a separate lot that the citizen and his friends bought together, or if the drinking "group" meets at a room rented for the occasion, the right of privacy still may completely protect the activity from governmental attempts to dictate the invitation list.

Of course, at some point the privacy interests at stake will diminish as the group activities take on a more commercial quality. In an intermediate zone may be an ostensibly private membership club where "the essence of membership is essentially the exchange of money for goods, services, or the use of facilities . . . ." Note, *supra,* 1970 Duke L.J. at 1220. In that case, the propriety of government intrusion may turn on other factors, such as characteristics that would demonstrate whether the relationships of members are still of an intimate or

personal nature despite the market-like quality of the club's provision of services. "Members of genuinely private clubs," even when they are devoted to recreational or social purposes, "have a substantial privacy interest with respect to membership practices." *Cornelius v. The Benevolent Protective Order of the Elks,* 382 F. Supp. 1182, 1202 (D. Conn. 1974). If the "members have genuinely chosen each other as social intimates, the club functions as an extension of their homes." *Id.* In applying the "private club" exemption in Title II of the Civil Rights Act, 42 U.S.C. § 2000a(e), factors such as selectivity in membership, extent of use of facilities by non-members, history of the organization, degree of control over the organization exercised by members, and existence of a profit motive have all been considered in analyzing the privacy interest at stake.[9] The same type of inquiry should guide constitutional analysis.

The privacy interest may decline virtually to extinction in the case of the large community pool, open to all persons, with little in the way of intimate membership interaction beyond simultaneous physical presence. *See Tillman v. Wheaton-Haven Recreation Association,* 410 U.S. 431 (1973); *see also Nesmith v. Young Men's Christian Association, supra.* Similar too would be the "club" that serves liquor to virtually all who wish to "join," with little or no membership involvement in the governance of the "club." *See Wright v. The Cork Club,* 315 F. Supp. 1143 (S.D. Tex. 1970). Also of telling importance is evidence that the private form that the organization takes is merely a subterfuge designed to avoid the impact of desegregation laws. *See, e.g., id.; United States v. Slidell*

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[9] *See Daniel v. Paul,* 395 U.S. 298 (1969); *Olzman v. Lake Hills Swim Club, Inc.,* 495 F.2d 1333, 1336 (2nd Cir. 1974); *Smith v. Young Men's Christian Association,* 462 F.2d 634, 648 (5th Cir. 1972); *Nesmith v. Young Men's Christian Association,* 397 F.2d 96, 101-102 (4th Cir. 1968); *see also Quijano v. University Federal Credit Union,* 617 F.2d 129 (5th Cir. 1980) (private club exception to Title VII).

Youth Football Association, 387 F. Supp. 474 (E.D. La. 1974). In those instances, there are virtually no close personal relationships that call for the protective shield of constitutional privacy. *See also Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Daniel v. Paul, supra; Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 311-13 (4th Cir. 1980).

Personal privacy interests may exist even in some commercial activities, however, and this recognition has led Congress to exempt dining clubs, employers with just a few employees, and rentals of rooms in private homes from a variety of federal bans on discrimination. *See* 42 U.S.C. §§ 2000a(e), 2000e(b), 2000e-1, 3603, 3607. The degree of constitutional protection for privacy ultimately turns on an analysis of the nature of the relationships and personal interactions at stake.

C. Are The Government's Interests Sufficiently Compelling?

In the final analysis, the State bears the burden of showing that its reasons for seeking to displace the constitutional protection are adequately compelling. Several factors must be analyzed to determine if the State's justifications for its actions are compelling enough to overcome the constitutional interest at stake. One consideration is the relationship of the State's specific goal to a proper governmental function. A State's showing that its goal involves a core governmental function, such as the protection of public safety against imminent threat to human life, would weigh heavily in the balance. So too could a showing that the State is pursuing some other affirmative constitutional policy, such as the prohibition of racial segregation and the elimination of "badges of slavery" in American society, a policy reflected in three constitutional amendments.[10]

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[10] *See Bob Jones University v. United States*, ____ U.S. ____, 103 S. Ct. 2017 (1983); *Runyon v. McCrary*, 427 U.S. 160 (1976); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 120-22 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973).

Other goals that merely represent exercises of the State's residual power carry less weight. The invocation of a generalized governmental interest will rarely be sufficient to overcome specific constitutional protections. If there is to be any vitality to the constitutional rights that the State seeks to displace, the assertion of an unfocused goal of ending non-racial "discrimination," just like a stated desire to prevent the "evils that are thought to inhere generally in solicitation by lawyers of prospective clients," *In re Primus, supra,* 436 U.S. at 432, cannot carry much weight in and of itself. *See also Cousins v. Wigoda,* 419 U.S. 477, 489-91 (1975) (State's interest in assuring the "integrity" of the electoral process is not "compelling" in context of election to nominate delegates to political party's national convention). Instead, the courts must assess the propriety and weight of the State's *particular* regulatory interest in overriding the specific rights at issue. *Id.*[11]

The Court must consider the nature of the activity being regulated. If the State's goal is to be served by imposing restrictions on affairs that are traditionally subject to government supervision, such as employment in the

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[11] Despite the attempts in various briefs of *amici* supporting appellants to suggest otherwise, this Court has never said that a State's general interest in "ending discrimination" is compelling in the sense that it is sufficient to overcome all constitutional interests. The decision in *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 609 (1982), simply stated that a State's interest in preventing discrimination against its citizens, particularly when they are members of an ethnic minority, gives the State standing to sue on their behalf. The Court's sex discrimination cases, *Orr v. Orr,* 440 U.S. 268 (1979), *Craig v. Boren,* 429 U.S. 190 (1976), and *Frontiero v. Richardson,* 411 U.S. 677 (1973), all concerned the degree of scrutiny to be applied when the *government* differentiates on the basis of sex, and suggest that distinctions based on sex are not as invidious as are classifications based on race or ethnic origin. In any event, those cases do not address the analytically distinct question of when the State may interfere with the freedom of association in the name of eradicating all non-governmental "discrimination" among different groups of people.

commercial marketplace, it may deserve greater deference. *See Ohralik v. Ohio State Bar Association, supra,* 436 U.S. at 460-62. The presence of an established regulatory role for the State implies diminished constitutional autonomy for the persons involved in those activities. *See generally* E. Bloustein, *supra,* at 140-41 (government regulation of business organizations under Anglo-Saxon law dates back to the 14th century). Innkeepers and the persons who manage the facilities of commerce have long been subject to government's historic interest in protecting a fair, orderly marketplace. Common carriers can lay little claim to strong constitutional protection when they hold themselves open to provide aid and comfort for hire on the public highways. Similarly, their customers can hardly be heard to claim that open access to those facilities intrudes into intimate associations. As Justice Douglas aptly stated, one "who of necessity rides buses and streetcars does not have the freedom that John Muir and Walt Whitman extolled." *International Association of Machinists v. Street,* 367 U.S. 740, 775 (1961) (concurring opinion).

The government's interest in regulating such commercial enterprises may grow with the increase in the organization's ability to control access to basic goods, services, or jobs. The propriety of governmental regulation under such circumstances is well established, dating back to the formation and regulation of trade guilds. This predominant public interest was reflected in the common law obligation of innkeepers and common carriers, who often provided the only lodging or transportation on a stretch of highway, to serve all customers, even though other businesses could refuse service at will. *See* Note, *Public Accommodations Laws and the Private Club,* 54 Geo. L.J. 915 (1966). Today, that same concern constrains the autonomy of labor unions, which often control

access to jobs, and justifies an obligation to open their membership roles on a nondiscriminatory basis.[12]

By contrast, the State's interest is far weaker when striking out at restrictions that present relatively minor impediments to a person's desire for economic advancement or social recognition. When the State is able to show no more than that *one* of many possible routes to a particular objective *may* be obstructed, its interest in forcing abandonment of that limitation can not be compelling.[13]

A final consideration is the degree to which the State has designed its regulation so as to minimize its intrusion into the group's internal affairs. If the regulation affects only the group's ancillary activities rather than its central purposes and nature, the interest behind the State's action need not be as strong. For example, a State would be justified in regulating admission into a restaurant run by

[12] *See, e.g., Railway Mail Association v. Corsi,* 326 U.S. 88 (1945); *United States v. International Longshoremen's Association,* 460 F.2d 497, 501 (4th Cir.), *cert. denied,* 409 U.S. 1007 (1972); *United States v. Jacksonville Terminal Co.,* 451 F.2d 418, 457 (5th Cir. 1971), *cert. denied,* 406 U.S. 906 (1972); *see also Developments in the Law, supra,* 76 Harv. L. Rev. at 993-94.

[13] Appellants and their *amici* compare this analysis to the discredited concept of "separate but equal," which supported racially segregated public facilities. That doctrine, however, bore on the right of the government to discriminate against its own citizens. The issue here is whether the government's interest in taking regulatory action is sufficient to justify interference with the constitutional freedom of its citizens to choose their own associates. It is perfectly appropriate in the present context to consider the necessity of the government's intrusion and the absence of substantial harm to others if the associational rights are respected.

Furthermore, to argue that a State has a compelling interest in eliminating discrimination in "public accomodations" begs the question. The real question is: when has the State overstepped the limits of its power by defining "public accomodations" so broadly as to interfere impermissibly with the freedom of association. The issue cannot be avoided by assuming the conclusion. Yet, that is what the appellants and the *amici* do when they argue that, because the Jaycees was found to be a "public accomodation" by the Minnesota courts, the State must have a compelling interest in regulating the group's membership policies.

the NAACP, but the NAACP's ownership of the restaurant would not justify regulation of the organization's membership policies. Similarly, State intrusion into the employment policies of the American Jewish Congress might be permissible, but an attempt to regulate the membership or internal affairs of the organization itself would not be entitled to equal deference. *See generally Fesel v. Masonic Home of Delaware, Inc.,* 428 F. Supp. 573 (D. Del. 1977), *aff'd mem.,* 591 F.2d 1334 (3rd Cir. 1979) (distinguishing, for purposes of applying the "private club" exception to Title VII of the 1964 Civil Rights Act, between the Masons organization itself and a nursing home run by the Masons).

When an association's membership criteria are functionally linked to the purposes and goals of the organization, government tampering with those criteria is most intrusive. As a consequence, the State's justification for overriding a basic criterion for affiliation would have to be weightier than for superseding some merely peripheral policy. *See Developments in the Law, supra,* 76 Harv. L. Rev. at 991. For example, the government would have to demonstrate a powerful interest in order to justify a requirement that a "singles" discussion group admit married people. By contrast, the government's burden would be lower if it simply proposed to outlaw "discrimination" on the basis of "marital status" in institutions of higher education.[14]

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[14] Different considerations may apply if the issue is not State regulation of membership policies, but rather the withdrawal of specific government benefits from organizations that discriminate, at least where the discrimination is racial. *See Bob Jones University v. United States, supra; Norwood v. Harrison,* 413 U.S. 455 (1973); *see also Evans v. Newton,* 382 U.S. 296 (1966) (park retained its public character despite formal transfer to private trustees, and hence remained subject to the Fourteenth Amendment's regulation of "State action"); *Sigma Chi Fraternity v. Regents of the University of Colorado,* 258 F. Supp 515, 527 (D. Colo. 1966) (eliminating racial discrimination in fraternities at State universities "constituted implementation of the substantive rights guaranteed by the Fourteenth Amendment").

When there is difficulty in applying this test, the State's desire to dictate a person's choice of associates must yield to a presumption in favor of protecting the interests of associational freedom and privacy. *See* pp. 16-17, *supra*. Any doubts about the propriety of governmental control of associational relationships should be resolved in favor of freedom rather than regulation.

III. THE DECISION BELOW IS CORRECT UNDER THE PROPER TEST.

The court below correctly applied the constitutional test. The court understood that the validity the State's intrusion into the right of association could

> "be determined only after a careful analysis of the extent and nature of the abridgement, the state interest asserted to justify the abridgement, the extent to which this interest will be impaired if the abridgement is set aside by the courts, and the extent to which this interest can be vindicated in less intrusive ways." 709 F.2d at 1570-71.

The court began by recognizing that the members of the Jaycees have a strong associational interest at stake. The Jaycees is not primarily a business, but is an association of like-minded people devoted to advancement of particular beliefs and purposes beyond the merely commercial. The organization was formed to serve educational and charitable purposes, and has adopted as its creed a specific set of religious, moral, economic and political beliefs. Throughout its history, the Jaycees has sponsored a wide varying of charitable and educational programs. *See* Motion to Affirm, filed December 1, 1983, at 6-8.

The Jaycees also has adopted specific programs to promote its position on national issues and publishes a magazine which includes articles addressed to public issues. In addition, the organization has many projects on

the national and local levels addressed to our Nation's most pressing social and political problems. *See id.* at 8-10. The Court of Appeals thus properly emphasized that, as an integral part of the organization's functions, the Jaycees engages in some activities that "fall within the narrowest view of First Amendment freedom of association," including the discussion of issues of public policy and the adoption and communication of formal positions on those issues. 709 F.2d at 1569.[15]

On the other side of the inquiry, the court found that Minnesota's interference with the Jaycees' membership policy threatens a great intrusion into the members' associational interests: "If the statute is upheld, the basic purpose of the Jaycees will change." 709 F.2d at 1571. Moreover, while the State's goal of clearing "the channels of commerce of the irrelevancy of sex" may be a public goal "of first magnitude," the issue is whether it is " 'compelling' *enough*" to justify the proposed intrusion; that question requires "a more particularized analysis" than the statute can withstand. 709 F.2d at 1572 (emphasis in original).

The court also recognized the tenuous link between the State's announced goal and the alteration of the Jaycees' membership standards. Although the State may outlaw sex discrimination in the sale of "goods and

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[15] The court also considered privacy-related interests. While acknowledging that the Jaycees is not a "small or intimate" group, the court did recognize that a certain selectivity is involved in membership: the Jaycees is not "a cross-section of the community, even of the young male community." 709 F.2d at 1572. Of course, an organization does not forfeit constitutional protection simply because it has gained a large number of adherents. *See, e.g. NAACP v. Button, supra; NAACP v. Alabama ex rel. Patterson, supra.*

The Court below also noted that the Jaycees does not hold "itself out as willing to sell its services to any member of the public." 709 F.2d at 1575. The court stated explicitly, however, that its decision "turned more" on the right to join with others to promote and instill beliefs, ideas and creeds "than on notions of privacy or intimacy." *Id.*

services" to the public, whether by the Jaycees or anyone else, 709 F.2d at 1573, maintenance of a gender-based policy governing full membership in the Jaycees imposes no great burden on public commerce or public life. The court carefully acknowledged that, "if the record showed that membership in the Jaycees was the only practicable way for a woman to advance herself in business or professional life, a different sort of weighing would have to take place, and such a statute might be upheld." *Id.* State intrusion into the Jaycees' membership, however, simply does not promise to have an important impact on the economic opportunities of women.

On balance, then, the court below properly concluded that the State had not shouldered its burden:

> "Once a serious incursion on a First Amendment right of association is shown, the normal presumption of constitutional validity is reversed. The state must show that its interference with the claimed right is clearly justified. We are not persuaded that the required showing has been made here, and we therefore hold that the application of the state public-accommodations law to the Jaycees' membership policies is, in the circumstances of this case, invalid under the First and Fourteenth Amendments." 709 F.2d at 1576.

In reviewing the State's invitation to this Court to subordinate the constitutional interests of the members of the Jaycees to the alluring goal of combatting "discrimination," it is worth recalling the skeptically wise question attributed to Sir Thomas More and quoted by the Court in *TVA v. Hill,* 437 U.S. 153, 195 (1978):

> "What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide . . . , the laws all being flat?"

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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